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Richard L. Pate J.D.

Sacred Heart University, pater@sacredheart.edu

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Invisible Discrimination: Employers & Social Media Sites

I. Introduction

With the advent and popularity of social networks sites, the boundaries of the relationship between the employer-employee/prospective employee have stretched well beyond the work-place and work-hours. Predictably, this relationship expansion has led to uncharted adversarial scenarios between the respective parties.

Ensuing legal disputes necessitate an expansion of the law's applicability (or new legislation) to this new world. The respective parties, employers especially, require a level of predictability regarding their respective rights and duties. While this predictability can only be offered by a body of well settled law, unfortunately, in this new, vibrant cyber world, traditional employment law considerations are struggling for deference and rumination.

Notwithstanding this ostensible indifference, each phase of the relationship is heavily impacted by social network media. Applicant recruitment, information gathering and applicant selection stand to be impacted by the social network communications made by employees or prospective employees. While Facebook users are projected to shortly reach 1Billion, no legislation exists specifically regulating the employer's access to and use of social network information for hiring and firing purposes.

This article examines whether present and proposed law protects employees' and prospective employees' rights from potential, unlawful discrimination resulting from the employer's use of social media in its applicant recruitment, information gathering and applicant selections processes.¹

I. The Competing Interests²

A. The Employer's Interests

The employer's desire to obtain and digest all possible information regarding a job applicant before selection is a logical business interest. A preliminary study finds a strong correlation between job performance and Facebook profiles.³ In a study published in the Journal of Applied Social Psychology, raters were asked to rate university students by personality related questions, such as "(I)s this person dependable?" after viewing the student's Facebook page only.⁴ Raters were, in essence, asked to "form impressions" of an applicant based solely on viewing the publicly available material (photos, status updates, and conversations) on the applicant's Facebook page.⁵

The raters then assigned a grade to each applicant for the attributes of a good employee; a degree of emotional stability, conscientiousness, extroversion, intellectual curiosity and agreeableness.⁶ Such findings were subsequently (six months later) matched to the student's job performance evaluation completed by the students' respective employers. The study found a clear and strong relationship between "good" Facebook scores and job

performance. Generally, the raters gave positive grades to students who traveled, had lots of friends and a variety of interests or hobbies.

Such indications suggest that a reasonable employer should review job applicants' social media communications. In its recruiting and selection process, it is, of course, in the employer's interest to distinguish between a poor applicant and a good applicant.

Under some circumstances, a review of an applicant's profile page may be more than a logical business decision, but may also constitute a legal necessity. Employer responsibility for the actions of an employee can potentially be based on two different theories. Firstly, under the doctrine of *respondeat superior*, when the employee commits a tort while in the course of his employment duties, the *employer* is rendered liable to the victim of the tort.⁷ While it is true that this type of vicarious liability, generally, does not create an affirmative duty to peruse an applicant's profile page prior to offering the position,⁸ a prudent employer would be better served to conduct such review in search evidence for propensity towards tortious conduct.⁹

Secondly, unlike vicarious liability, which is based on the indirect liability of the employer, *direct liability* may also be imposed on the employer for the eventual tortious acts of the employee.¹⁰ An employer may be directly liable based on the theory of negligent hiring. This doctrine stems from pure negligence concepts, that is, an employer must exercise reasonable care when hiring a

person to perform specific duties.¹¹ For example, an employer may be deemed to be acting unreasonably, i.e., negligently, when it employs a person, previously convicted of child abuse, to work in a position entailing direct contact with children, if harm to the children ensues. Most states' law holds employers liable for the tortious acts of the employee when the employees' tortious acts were reasonably foreseeable at the time of hiring.¹² Negligent hiring is based on the fact that it was negligent for an employer to hire the employee given what the employer knew or should have known about the employee at the time of hiring. Using Connecticut as an example, "(t)he ultimate test of the existence of the duty to use care is found in the foreseeability that harm may result if it is not exercised."¹³ "It is well settled that defendants cannot be held liable for their alleged negligent hiring(...) of an employee accused of wrongful conduct unless they had notice of said employee's propensity for the type of behavior causing the plaintiff's harm."¹⁴

Since foreseeability is the basis of this tort, the inevitable question is whether employers must perform a perfunctory investigation of an applicant's profile page (especially given the relative ease of doing so) prior to employing the candidate. No case has explicitly found that a failure to review online information before hiring an employee who later commits a tort, constitutes negligence hiring. Other than statutorily required background checks in connection to sensitive positions such as teachers and law enforcement personnel,¹⁵ current law is not clear on this point.¹⁶ Some courts have imputed

to employers the obligation to investigate an applicant's background.¹⁷ While in other jurisdictions the existence of the duty may depend on the nature of the position sought, the hazardous nature of the employee's tasks, the level of interaction of employee with public and the correlation between the employee's prior misconduct and the nature of the position sought.¹⁸ Notwithstanding this lack of clarity, seemingly, it is in the interest of the employer to conduct a review of an applicant's profile before hiring the applicant.¹⁹

In fact, employers do conduct reviews of applicants' profile page. According to a study conducted for CareerBuilder.com by Harris Interactive,²⁰ 45% of employers surveyed are using social networks to select applicants.²¹ Just one year earlier, a similar study found that 22% of employers were using social networks sites like Facebook, MySpace, Twitter and LinkedIn to review applicants.²² The study found that 35% of employers based their decision to deny applicants jobs on the content viewed on the respective applicant's social networking site.²³ In the study, Facebook proved to be the most popular social media site for employers to conduct their applicant screening (followed by LinkedIn, MySpace and Twitter).²⁴ Over 50% the employers who participated in the survey stated that provocative photos played the biggest role in a decision not to hire an applicant, while 44% of employers used applicants' references to drinking and drug use as red flags as a contributor to not employing applicant.²⁵ A survey commissioned by Microsoft in 2010, also showed that 79% of the U.S. employers which participated in study use the

Internet to screen applicants and that 70% employers rejected applicants based on the search results.²⁶

Not only have employers demonstrated their willingness to search profiles, recently, they have also demanded applicants' passwords to respective social media sites as a condition of employment.²⁷ The practice first came to attention when the Maryland Division of Corrections (DOC) policy required that job applicants for employment with the DOC provide the government with their social media account usernames and personal passwords for use in employee background checks.²⁸ As consequence, corrections officer Robert Collins was required to provide his Facebook login and password to the DOC. During the interview the interviewer logged on to Collins' social media site and read the latter's postings and those of his family and friends.

The above conclusions demonstrate that the employer (1) should review profiles, (2) at times may need to review profiles, (3) most times will review the profiles, and (4) that it will use the information contained in profile to deny a position. How are these legitimate business and legal concerns contrary to the interests of the applicant?

B. The Applicant's Interests

When viewing unbridled media site profiles, an employer may potentially view and discern, among other things, the age, religion, color, race, gender, disability, sexual orientation, military status, or the nationality of an applicant.

This information gives the employer the ability to go beyond legitimate applicant recruitment and selection. The employer is afforded the opportunity to enter the realm of unlawful discrimination. Typically, other than an applicant's gender (most time discoverable from a name on application) the applicant's attributes are likely to be revealed only after an interview, in fact, some characteristics may never be discovered. However, a pre-interview review of a profile is likely to show the above mentioned classifications before the applicant meets with employer.

Accordingly, the employer's ability to discriminate is greatly facilitated. The employer can discriminate based on one or more of the above classifications without the applicant knowledge. That is, in absence of an interview, and therefore without the knowledge of the employer's review of her profile page, an applicant is likely to never know if she was denied the position because of, for example, her color.

It is the applicant's interest to participate in the world of social media sites without giving up the opportunity to gain employment because of her merit, or be denied a position because of her race, color, religion, gender, national origin, age or disability, for example.

The legal (and social) issues are then formulated: How can the law avoid interfering with the prudent employer's need to review content that clearly aids in its recruitment and selection process, and simultaneously prevent the

employer the opportunity to view and weigh factors which may potentially lead to unlawfully discriminate? And, how can the law achieve this without the applicant's notice of the unlawful discrimination?

II. The Adversarial System

A. Litigation

The U.S. legal system is based on the adversarial system.²⁹ As opposed to the inquisitorial systems where a judge or other public decision maker is the proponent of the facts and legal evaluation,³⁰ "an adversary system relies upon the parties to produce the facts and legal arguments that will be forwarded on their behalf, for such a system to function properly, the parties must be somewhat equally capable of producing their cases."³¹ "(The) accepted virtue of the common law, adversarial system of justice is that it leaves more control in the parties...By placing control in the individual over the state the adversary system reflects deeper values of liberalism and even natural justice."³² Our decision to resolve legal disputes in this manner, however, triggers equality concerns.³³ "If one side in adversarial adjudication is ill-equipped--it cannot afford access to the system, or has less time and money to pursue evidence, or less skill in developing legal claims--then what emerges as the stronger case might not necessarily be the better case...(T)he parties must be given relatively equal opportunities to present their case."³⁴ The adversarial system hinges on party control of the investigation and presentation of evidence.³⁵

The anticipatory use of social media information by employers does not simply trigger such concerns, it eradicates the adversarial system. More specifically, when an employer views the content of an applicant's profile prior to an interview, it gains an overwhelming competitive edge over the applicant and the law in the adversarial setting. As stated above, this preliminary view of the profile allows the employer to make the hiring decision without the applicant's knowledge that he or she is even under consideration. If an employer discerns an applicant's color, for example, and bases its decision not to hire on such factor, it is essentially free to unlawfully discriminate effortlessly and without much consequence; the applicant will simply never know that this misconduct has occurred.³⁶ Without notice of the wrongdoing the applicant will not seek redress, hence she will not investigate the matter, file a charge of discrimination or litigate the case; no adversarial setting will ever be triggered into play. That is no enforcement of the anti-discrimination law will occur.

As stated above, in an adversarial system, the parties must be put on equal footing to present their case.³⁷ The adversarial system rests on party's ability to investigate and present the evidence.³⁸ The above described applicant is clearly not on equal footing with the employer. In fact, she is likely to never become one of the adversaries. In essence, social media sites remove possible discriminatory conduct from the purview of justice by temporally moving such conduct outside reality and into the cyber world, rendering unlawful discrimination invisible.

B. Agency Enforcement

The Equal Employment Opportunity Commission (“EEOC”) has the authority under Title VII and the ADA to file a Commissioner’s charge independently of an employee or applicant’s charge,³⁹ arguably, lessening the harm caused by the lack of an adversarial system. The EEOC Compliance Manual states as follows: “While the principal means for implementing Commission policy is the investigation of individual charges, EEOC-initiated investigations are a necessary part of the enforcement process. Discrimination victims are often unaware of their rights or unaware of discriminatory practices. While this is typically so in cases of systemic discrimination, it is also true in cases where discrimination is less pervasive. Field offices should not hesitate to recommend Commissioner charges or initiate directed investigations when such action will fulfill EEOC’s law enforcement mission.”⁴⁰

The EEOC has a special interest in pattern or practice of discrimination cases because “‘it has access to the most current statistical computations and analyses regarding employment patterns’ (and) was thought to be in the best position ‘to determine where “pattern or practice” litigation is warranted’ and to pursue it.”⁴¹

However, notwithstanding this mandate, in the end, the EEOC’s authority to initiate its own litigation is rarely used. In 2011, only 47 Commissioner’s charges were filed, while 99,947 charges were filed by individuals against their employer.

The EEOC's reliance on the adversarial system is evident.⁴² Given this heavy reliance, ostensibly, the EEOC is as powerless as the individual applicant as means of discovering and redressing discriminatory conduct. After all, with the possible exception of pattern and practice cases (where statistics play a major role), the EEOC is in no better position than the applicant when it comes to discovering invisible discriminatory conduct. In the end, the EEOC's own enforcement of anti-discrimination law is also rendered less than efficacious.

III. Current Legislation: Does it Protect Applicant?⁴³

A. The Password Trend

The analysis begins with the most recent trend in the employer-employee/applicant relationship, that is, the employer's practice of demanding applicants' social media sites passwords as a condition of employment or as a part of the hiring (see Maryland Division of Corrections matter described above). Although new, the practice may be short lived. Maryland itself became the first state to pass legislation prohibit employers from requiring applicants and employees to disclose their passwords (the law takes effect on October 1, 2012).⁴⁴ On August 1, 2012 Illinois signed into law (effective January 1, 2013) amendments to the Right to Privacy in the Workplace Act,⁴⁵ thereby prohibiting, among other things, employers from asking applicants and employees to provide passwords and log-in information to personal social networking sites. Similar legislation has been introduced in California, Illinois,

Maryland, Michigan, Minnesota, Missouri, New York, South Carolina and Washington.

Congress is currently considering two related bills. In April 2012, Reps. Eliot Engel and Jan Schakowsky introduced the Social Networking Online Protection Act,⁴⁶ and in May 2012, Sen. Richard Blumenthal and Rep. Martin Heinrich introduced the Password Protection Act of 2012.⁴⁷ Both proposed laws would prohibit employers from, among other things, requiring or asking an employee or applicant to provide a password for access to personal social media account.

Law makers' reaction to this latest practice indicates that employees will not be subject to the password requirement. However, the legislative reaction does not protect the employees from the use of information that is openly available on the Internet.

B. The Fair Credit Reporting Act

The Fair Credit Reporting Act (FCRA),⁴⁸ among other things, regulates employment background checks performed by third parties on behalf of employer.⁴⁹ The Act requires that when a third party prepares a background check of an employee or applicant, the latter two must be notified of the investigation; given the opportunity to give or refuse consent; and notified if information from the report is used to make an adverse hiring decision.⁵⁰ The FCRA requires an employer to "clearly and accurately notify applicants in

writing if they will be the subject of a consumer credit report prepared by a consumer reporting agency.”⁵¹

Unfortunately, the FCRA and its protections do not apply when an employer performs its own profile search. Accordingly, the FCRA would be of no aid to the aforementioned applicant.

C. Stored Communications Statutes

As stated above, this note’s analysis is based on applicants’ whose profile is public. In instances where the applicant’s media site is not public but is nevertheless accessed by employer without the applicant’s consent, a violation of the Stored Communications Act may be found. The Electronic Communications Privacy Act (ECPA)⁵² includes federal wiretapping laws and federal laws prohibiting unauthorized access to communications in electronic storage.

Title II of the ECPA created the Stored Communications Act (SCA)⁵³, intended to “address access to stored wire and electronic communications and transactional records.” The SCA makes it a federal crime for anyone to “access” without “authorization”, or in excess of authorization, a “facility providing electronic communication services and thereby obtaining access to a wire or electronic communication while it is in electronic storage.” The SCA would be of no help to an applicant with a public profile.⁵⁴

D. Federal Computer Fraud and Abuse Act

Although this Act is often used by employers to pursue claims against their employees, arguably, an employer who exceeds its authorized access to a profile or the social network's server, may be in violation of the Computer Fraud and Abuse Act (CFAA).⁵⁵ Again, however, the CFAA would be of no help to an applicant with a public profile.

E. Title VII, The ADA and the ADEA

An array of antidiscrimination statutes exists if we consider state and federal law. The most fundamental federal statutes, however, are listed below. Under Title VII of the 1964 Civil Rights Act,⁵⁶ an employer shall not "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."⁵⁷ Under the Americans with Disabilities Act (ADA)⁵⁸ an employer cannot make an adverse employment decisions against "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." Pursuant the Age Discrimination in Employment Act (ADEA), it is against the law for an employer "to fail or refuse to hire or to discharge any individual or

otherwise discriminate against any individual . . . because of such individual's age."⁵⁹

As a consequence of this legislation and disparate treatment and disparate impact principles, employers are prohibited from making inquiries such as the following examples, in response to an applicant's application.⁶⁰

Are you Hispanic?
What is your ethnicity?
What is your race?
What is your national origin?
Are you a citizen of this country?
Where were you born?
What is your religion?
Do you attend church?
How old are you?
When were you born?
Are you disabled?
Are you an addict?⁶¹

Additionally, as a consequence of this legislation and especially disparate impact principles employers are *strongly discouraged* from making inquiries such as the following examples, in response to an applicant's application.

Are you married?
Do you have children?
Do you plan to have children?
Are you pregnant or planning to become pregnant?
Have you ever been charged with a crime?
Have you ever bounced a check?
Have you ever failed to make a payment on a loan?
Were you honorably discharged from the military?
How tall are you?
How much do you weigh?
Are you a citizen?
Where were you born?
What is your religion?
Can you work on Sunday?
What organizations do you belong to?⁶²

The introduction of social media sites into this paradigm demonstrates the growing irrelevance of employment law in the cyber-world. A profile or even simply a posted photo of an applicant may give the employer the answer to most of these inquiries, without the need to pose a single unlawful question. And, as stated above, the employer can collect and consume such responses without the applicant's knowledge that she is unknowingly responding to unlawful inquiries. To a great extent, this represents the demise of antidiscrimination protection at the employee recruiting and selection phase. The more the employer looks, the more it sees, the more it sees, the greater the potential of discrimination.

In the end, no federal statute specifically prohibits employers from obtaining or utilizing information gathered from profile searches.

IV. Conclusions & Recommendations

The preliminary findings of this note are as follows: (1) The employer should review profiles, (2) the employer, at times, must review profiles, (3) the employer most times will review profiles, (4) the employer will most times use information contained in profile to make a hiring decision. Lastly, it is also clear that (5) the employer's review of social media sites takes any potential discriminatory conduct outside the temporal parameters contemplated by current anti-discrimination statutes, and, consequently, (6) the applicant and the EEOC are unlikely to discover the discriminatory conduct. Without notice of the

misconduct, the adversarial system stops functioning and with it the enforcement of anti-discrimination law.

Based on these conclusions, to remain consequential in this new world, anti-discrimination protection must find a presence in that pre-interview slice of time. Two avenues seem most apt towards achieving this end. The first option is to steer away from the reasoning reflected in the current “password related legislation” discussed above. That is, given the absence of an adversarial system to enforce the law, a categorical prohibition of employer’s use of social media content in hiring decisions would be less than a weak warning. Since it seems clear that employers are actually using the online content to make decisions, the first clear choice is to require employers to report to the EEOC and the applicant every instance of social media site review (in the context of making hiring related decision). As a result, the applicant and the EEOC would have notice of the review and the option to re-enter the adversarial system should discriminatory conduct be suspected.

The reporting system currently required by the FCRA should be expanded.⁶³ As stated above, among other things, this law regulates employment background checks performed by third parties on behalf of employer.⁶⁴ The Act requires that when a third party prepares a background check of an employee or applicant, the employer must “clearly and accurately notify applicants in writing if they will be the subject of a consumer credit report

prepared by a consumer reporting agency.”⁶⁵ The FCRA’s protections have not been expanded to cover employer conducts its own background check. Amending the law to make it applicable to employer’s own searches would, as stated above, reactivate the adversarial system by giving notice to the applicant and the EEOC. Of course, we remain with traces of the problem: How can one ascertain if the self-regulated reporting is a true reflection of the employer’s searches; for unscrupulous employers, the ones more likely to discriminate, the searches and the discrimination would remain invisible.

The second option consists of applying a rebuttable presumption element to discrimination cases. In discrimination related cases, employers would have the burden of rebutting the presumption that they *did* view social media sites when they made their hiring decision. Of course, this would be quasi irrefutable in instances where an employer has an actual declared internet screening policy. Obviously, the employer’s burden of rebutting the presumption would be onerous. However, placing this burden on the employer in order to rescue the adversarial system is a burned worth imposing. In the end, such a presumption does not create any greater burden than that of a small business owner operating in a small town where everybody knows everybody.

¹ The focus of this note is on the effects of social media sites/profiles on discriminatory practices in the workplace. However, it should be mentioned that the growth of such communications has also impacted employee privacy, discipline and discharge, and has also not left unscathed union protected employees.

Several cases have seen the application of tort based legal theories such as defamation, invasion of privacy, wrongful disclosure of confidential information or trade secrets. Cases against public employers may also rely on the U.S. Constitution, arguing that certain aspects of profile searches constitute an unreasonable search and seizure. Other cases have raised exceptions to the general at-will doctrine, such as violation of public policy and statutory protections such as anti-retaliation statutes based on protected activities such as free speech.

For examples of cases dealing with discipline and discharge of employees due to social media sites posts, see Simonetti v. Delta Airlines, No. 1:05-CV-2321, 2005 WL 2407621 (N.D. Ga. Sept. 7, 2005) in which a flight attendant posted a suggestive photo of herself on MySpace page and was later discharged for the same; Pietrylo v. Hillstone Rest. Grp., No. 06-5754 (FSH), 2008 U.S. Dist. LEXIS 108834 (D.N.J. July 25, 2008), where an employee was discharged after staring a MySpace page and posting numerous comments about management. See also, <http://www.higheredmorning.com/professor-suspended-for-facebook-posts> (last visited September 1, 2012), (professor was suspended after a student reported humorous comments on her Facebook page, about “not wanting to kill” any students that day. Facebook: Professor Suspended for Posts, HigherEdMorning.com; see also Ayla Webley, *How One Teacher's Angry Blog Sparked a Viral Classroom Debate*, Time/CNN, Feb. 18, 2011, <http://www.time.com/time/nation/article/0,8599,2052123,00.html#ixzz1Fx9Ba0fz> (last visited September 1, 2012.)

Social media sites’ popularity has also impacted union protected employees. On May 30, 2012, the National Labor Relations Board (NLRB), through its Acting General Counsel (GC), issued a *third* Operations Management Memo on social media cases in less than a year. <https://www.nlr.gov/news/acting-general-counsel-releases-report-employer-social-media-policies> (last visited July 8, 2012).

See also the 2011 NLRB survey which indicates that the NLRB has reviewed more than 129 cases involving social media sites. The central issues of cases regard discharge or discipline of employees based on their social media posts and whether the posts are a protected activity under the National Labor Relations Act.

<http://www.uschamber.com/sites/default/files/reports/NLRB%20Social%20Media%20Survey%20-%20FINAL.pdf> (last visited August 28, 2012).

² Throughout this note, the terms “social media site” and “profile” are used synonymously and are defined as follows: A form of electronic communication (as Web sites for social networking and microblogging) through which users create online communities to share information, ideas, personal messages, and other content (as videos). See Social Media, Merriam-Webster, <http://www.merriam-webster.com/dictionary/social%20media> (last visited Sept. 23, 2012) (last visited September 23, 2012). Popular examples include Facebook, Twitter, Linked-In, and YouTube.

Throughout this note it is presumed that an applicant’s social media site/profile (such as a Facebook profile) is public and not protected by privacy settings.

³ Donald H. Kluemper et al., Social Networking Websites, Personality Ratings, and the Organizational Context: More Than Meets the Eye? 42 *Journal of Applied Social Psychology*, Volume 42, Issue 5, pp. 1143–1172 (2012).

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ Richard A. Epstein, *Cases and Materials on Torts* 432 (9th ed. 2008).

⁸ Restatement (Second) of Agency § 219(1) (1958).

⁹ Daniel E. Mooney, Comment, Employer on the Web Wire: Balancing the Legal Pros and Cons of Online Employee Screening, 46 *Idaho L. Rev.* 733, 758 (2010).

¹⁰ Restatement (Second) of Agency § 213 (1958).

¹¹ *Id.*

¹² Lex K. Larson, *State-by-State Analysis, Employment Screening* (MB) pt. 1, ch. 11 (2010).

¹³ Perodeau v. Hartford, 259 Conn. 729, 754, 792 A.2d 752 (2002).

¹⁴ Knicrumah v. Albany City School District, 241 F.Supp.2d 199, 211 (N.D.N.Y.2003).

¹⁵ For example, Connecticut law requires all public school employees hired on or after July 1, 1994, to submit to state and national criminal history record checks when they are hired. According to a survey by Education Week, 42 states require criminal background checks for teacher certification. The states that do not have background check requirements for teachers are Illinois, Indiana, Massachusetts, North Carolina, Ohio, Pennsylvania, Tennessee, and Wisconsin. See "State Policies on Sexual Misconduct Between Educators and Students," Education Week, April 30, 2003.

¹⁷ See, e.g., Kendall v. Gore Props, Inc., 236 F.2d 673 (D.C. 1956); Weiss v. Furniture in the Raw, 306 N.Y.S.2d 253 (N.Y. Civ. Ct. 1969); Robertson v. Church of God Int'l, 978 S.W.2d 120, 125 (Tex. App. 1997) ("One who retains the services of another has a duty to investigate the background of that individual for fitness for the position....").

¹⁸ "Liability of the employer is predicated on the employer's antecedent ability to recognize a potential employee's 'attribute(s) of character or prior conduct' which would create an undue risk of harm to those with whom the employee came in contact in executing his employment responsibilities.... The scope of the employer's duty in exercising reasonable care in a hiring decision depends on the employee's anticipated degree of contact with other persons in carrying out the duties of employment. The requisite degree of care increases, and may require expanded inquiry into the employee's background, when the employer expects the employee to have frequent contact with the public or when the nature of the employment fosters close contact and a special relationship between particular persons and the employee." Moses v. Diocese of Colorado, 863 P.2d 310, 323-324 at 327-328 (Colo.1993), cert. denied, 511 U.S. 1137, 114 S.Ct. 2153, 128 L.Ed.2d 880 (1994) (citations omitted), quoting Connes v. Molalla Transport System, Inc., 831 P.2d 1316, 1321 (Colo.1992).

For example, in Ponticas v. K.M.S. Invs., 331 N.W.2d 907, 911 (Minn. 1983), "the apartment manager had access to tenants' homes, his employer had a

duty to conduct a reasonable investigation to explore whether the manager posed a high risk of injury to the apartment complex's residents. The employee in question had a criminal history of armed robbery and other felonies that a cursory criminal background check would have revealed. Additionally, the employee had listed his mother and sister as his employment references. Due to the ease with which the employer could have discovered that the employee had committed violent crimes and had provided sham employment references, the court upheld the jury's finding that the employer was liable for negligent hiring." Katherine A. Peebles, *Negligent Hiring And The Information Age: How State Legislatures Can Save Employers From Inevitable Liability*, 53 Wm. & Mary L. Rev. 1397, 2012.

See also *Proceed with Caution: Social Networking Websites and Blogs*, Labor Law Reports, May 27, 2009, at 1, available at <http://www.bicklaw.com/Publications/LAWFULMININGOFSOCIALNETWORKS.htm> (last visited June 1, 2012); and Jonathan Bick, *Lawful Mining of Social Networks*, N.J. Law J., Feb. 16, 2009.

¹⁹ In jurisdictions where the duty clearly does not exist, an argument could be made that if an employer may only be liable for what is reasonably foreseeable, it behooves him not to review any profiles and argue ignorance of any of the applicant's propensities. However, as can be learned from the statistics below, the employer is likely to deem the benefits of a search to outweigh the possible consequences of the review.

²⁰

<http://www.careerbuilder.com/share/aboutus/pressreleasesdetail.aspx?id=pr519&sd=8/19/2009&ed=12/31/2009> (last visited June 30, 2012).

²¹ Id.

²² Id.

²³ Id.

²⁴ Id.

²⁵ Id.

²⁶ Cross-Tab, *Online Reputation in a Connected World* 5-6 (2010), available at <http://www.microsoft.com/privacy/dpd/research.aspx> (follow hyperlink labeled "Online reputation research overview PDF") (last visited September 8, 2012).

²⁷ This trend has been met with opposition, as discussed below.

²⁸ 02/18/ Want A Job? Password, Please! By Meredith Curtis, ACLU of Maryland at 2:04pm <http://www.aclu.org/blog/technology-and-liberty/want-job-password-please> (last visited July 8, 2012).

²⁹ See, e.g., *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 28 (1981) ("(O)ur adversary system presupposes (that) accurate and just results are most likely to be obtained through the equal contest of opposed interests...");

See *McNeil v. Wisconsin*, 501 U.S. 171, 181 n.2 (1991) ("What makes a system adversarial rather than inquisitorial is...the presence of a judge who does not (as an inquisitor does) conduct the factual and legal investigation himself, but instead decides on the basis of facts and arguments pro and con adduced by the parties.").

³⁰ As is the case in most of Europe. See John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. Chi. L. Rev. 823 (1985).

³¹ William B. Rubenstein, *The Concept Of Equality In Civil Procedure*, 23 Cardozo L. Rev. 1865 (2002).

³² Martin E.P. Seligman, et al., *Why Lawyers Are Unhappy*, 23 Cardozo L. Rev. 33 Cardozo Law Review (2001).

³³ Rubenstein, *supra* note 31, at 1874.

³⁴ *Id.* See also Alan Wertheimer, *The Equalization of Legal Resources*, 17 Phil. & Pub. Affairs 303 (1988).

³⁵ Judith Resnik, *Managerial Judges*, 96 Harv. L. Rev. 374, 380 n.23 (1982); See also Judith Resnik, *Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation*, 148 U. Pa. L. Rev. 2119, 2136 (2000) ("Equipage for civil litigants—from filing fees to investigation to counsel for experts—is generally left either to the legislature or to the market.").

³⁶ Arguably, an applicant could hire an expert to find an online trail left by an employer's search. However, without some notice of the employer's search or suspicion thereof, the applicant's curiosity is unlikely to be sufficiently aroused to take such steps. And, in the cases where the suspicion or notice is present, the cost of such steps may be prohibitive.

Title VII of the Civil Rights Act, the Americans with Disabilities Act and the Age Discrimination in Employment Act (all discussed below) do require employers to retain applications and other personnel records relating to hiring process. One could argue that such records could be used to trigger investigations, etc. However, the unscrupulous employer, the one most likely to discriminate, is unlikely to abide by this law if it knows the chances of being found out are minimal. Moreover, the applicant is not automatically entitled to a copy of such records, thus, who would review such innumerable documents?

³⁷ Rubenstein, *supra* note 31, at 1874.

³⁸ Resnik, *supra* note 35, at 379.

³⁹ See 42 U.S.C. § 2000e-6(e) (2008); 29 C.F.R. §§ 1601.7-11; § 2000e-5(b);

1 EEOC Compliance Manual (BNA) 8:0001 (2001)(Hereinafter referred to as "EEOC Intake")("Under Title VII/ADA, EEOC must have a basis to investigate possible violations and must obtain a Commissioner charge and notify the respondent of such basis by specifying the date, place and circumstances to be covered by the investigation. Under ADEA/EPA, there are no prerequisites which must be met to investigate."

No commissioner's charge provisions are found in the ADEA and the EPA, however, the EEOC may investigate into violations of these two statutes. EEOC Intake.

⁴⁰ *Id.*

⁴¹ Equal Employment Opportunity Comm'n v. Shell Oil Co., 466 U.S. 54, 69 (1984).

⁴² <http://www.eeoc.gov/eeoc/plan/upload/2011par.pdf> (last visited September 18, 2012)

⁴³ With some exceptions, the ensuing discussion does not examine state (U.S.) anti-discrimination law, but focuses on pertinent federal law.

⁴⁴ To be codified at Md. Code Ann., Lab. & Empl. § 3-712.

⁴⁵ Illinois HB 3782 amends the state's Right to Privacy in the Workplace Act

⁴⁶ H.R. 5050, 112th Cong., 2d Sess. (Apr. 27, 2012).

⁴⁷ S. 3074, 112th Cong., 2d Sess. (May 9, 2012).

⁴⁸ 15 U.S.C. §§ 1681-1681t (2000 & Supp. 2003).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² 18 U.S.C. §§ 2510-2522

⁵³ 18 U.S.C. Chapter 121 §§ 2701-2712.

⁵⁴ In Crispin v. Christian Audigier Inc., 717 F. Supp. 2d 965 (C.D. Cal. 2010), a federal district court decided that the SCA applies to social media posts, provided that a posting had established privacy settings was content electronically stored within the meaning of the SCA and thus could not be accessed without authorization.

See also, Pietrylo v. Hillstone Rest. Group, 2008 WL 6085437; and Konop v. Hawaiian Airlines, Inc., 236 F.3d 1035 (2001) (D.N.J. July 24, 2008), making it clear that under some circumstances unconsented access to private media sites may constitute a violation if the SCA.

⁵⁵ 18 U.S.C. § 1030.

⁵⁶ 42 U.S.C. §§ 2000e-2 (2000).

⁵⁷ 42 U.S.C. §§ 2000e-2(a)(1).

⁵⁸ 42 U.S.C. §§ 12101-12213 (2000).

⁵⁹ 29 U.S.C. §§ 621-634 (2000).

⁶⁰ Many of such questions are not explicitly prohibited by the language of the aforementioned antidiscrimination laws (except for the ADA), but in some cases have been de facto made unlawful by federal regulations and EEOC guidance. It is beyond the scope of this article to discuss specific federal regulations and EEOC guidance regulating such inquiries.

⁶¹

http://www.peopleclick.com/resources/wpaper/Social_Networks_Employment_Law_eBook.pdf (last visited September 29, 2012)

⁶² Id.

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⁶³ 15 U.S.C. §§ 1681-1681f (2000 & Supp. 2003).

⁶⁴ Id.

⁶⁵ Id.